

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In The Matter Of)	
)	
Infinity Radio Operations, Inc.)	File No. EB-02-IH-0624-GC
)	NAL/Acct. No. 200332080020
Licensee of Station WBLK(FM),)	FRN 0004036711
Buffalo, New York)	Facility ID # 71215

ORDER ON RECONSIDERATION

Adopted: February 23, 2005**Released: February 24, 2005**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this Order on Reconsideration, we deny a Petition for Reconsideration ("*Petition*")¹ by Infinity Radio Operations, Inc. ("Infinity"), of a Forfeiture Order ("*Forfeiture Order*") for \$4,000 issued by the Enforcement Bureau ("Bureau") on August 12, 2004.² In the *Forfeiture Order*, we found that Infinity had violated section 73.1206 of the Commission's rules³ by broadcasting a telephone conversation without first informing the party to the conversation of its intention to do so. Infinity argues that our use of the underlying facts from an unpaid, unadjudicated forfeiture order, issued for its violation of section 73.1206 in a previous proceeding, to rebut its claim in the present proceeding that it had no prior offenses violates section 504(c) of the Communications Act of 1934, as amended ("the Act").⁴ Infinity also disputes our rejection of its claim that the forfeiture amount should be reduced or canceled based on its good faith efforts to comply because the Bureau has done so recently for licensees in other proceedings that involve allegedly comparable circumstances.

II. BACKGROUND

2. On August 5, 2003, we issued a Notice of Apparent Liability for Forfeiture ("*NAL*"),⁵ finding that Infinity, licensee of Station WBLK(FM), Buffalo, New York, violated section 73.1206 of the Commission's rules. Specifically, we found that WBLK(FM) had broadcast a telephone conversation on June 26, 2002, between Shae Moore, a disc jockey employed by Infinity, and Brenda Tanner, a telephone customer service representative employed by Adelphia Communications, Inc., without informing Ms.

¹Infinity Radio Operations, Inc., Petition for Reconsideration, filed September 13, 2004 ("*Petition*").

²See *Infinity Radio Operations, Inc. (WBLK(FM))*, Forfeiture Order, 19 FCC Rcd 15,460 (Enf. Bur. 2004) ("*Forfeiture Order*").

³Section 47 C.F.R. § 73.1206.

⁴47 U.S.C § 504(c) (generally prohibiting the use of a notice of apparent liability for forfeiture (NAL) that has neither been paid nor finally adjudicated in another proceeding to the detriment of the person to whom the notice was issued).

⁵*Infinity Radio Operations, Inc. (WBLK(FM))*, Notice of Apparent Liability for Forfeiture, 18 FCC 16,191 (Enf. Bur. 2003) ("*NAL*").

Tanner of the intent to broadcast the conversation. Based on the facts and circumstances surrounding the apparent violation, we proposed the base forfeiture amount of \$4,000 for such a violation.⁶ In discussing the statutory factors to be considered in determining this forfeiture amount, we rejected Infinity's prior claim in response to our letter of inquiry⁷ that the broadcast was an "isolated incident" by citing another proceeding, *EZ Sacramento*, in which the Commission assessed a forfeiture against another Infinity affiliate for similar conduct in violation of section 73.1206.⁸ After reviewing Infinity's Response to Notice of Apparent Liability for Forfeiture, filed September 4, 2003 ("*NAL Response*"),⁹ we issued the *Forfeiture Order*, imposing the proposed base forfeiture amount.

3. On September 13, 2004, Infinity filed the *Petition*, requesting the Bureau to reconsider the *Forfeiture Order* and decline to impose any penalty on Infinity for two reasons. First, Infinity contends, as it did in its *NAL Response*,¹⁰ that the Bureau's reference to a prior offense by Infinity violates section 504(c) of the Act, concerning the use of a notice of apparent liability from another proceeding that has neither been paid nor finally adjudicated.¹¹ Second, Infinity argues, again as it did in its *NAL Response*,¹² that the Commission has reduced or cancelled forfeitures in other proceedings that are comparable to the present one in terms of the licensee's good faith efforts to comply.¹³

III. DISCUSSION

A. The Forfeiture Order Did Not Violate Section 504(c) Of The Act Or The Due Process Clause Of The Fifth Amendment

4. In the *Petition*, Infinity argues that the *Forfeiture Order* should be reversed because the Bureau's reference in the *NAL* and the *Forfeiture Order* to *EZ Sacramento*, which forfeiture has neither been paid nor finally adjudicated by a court, violates section 504(c) of the Act. Section 504(c) provides:

In any case where the Commission issues a notice of apparent liability looking toward the imposition of a forfeiture under this Act, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.¹⁴

5. In the *Forfeiture Order*, we rejected Infinity's section 504(c) argument because the citation to *EZ Sacramento* was only to rebut Infinity's inaccurate claim that the telephone broadcast was an isolated incident. We explained that our reference was to the underlying facts of similar conduct,

⁶*Id.*, 18 FCC Rcd at 16,192, ¶ 6.

⁷See Letter, dated September 17, 2002, from Stephen A. Hildebrandt, Vice President, Radio Station WBLK(FM), to Charles W. Kelley, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission ("*LOI Response*") at 1-2.

⁸*EZ Sacramento, Inc.*, 16 FCC Rcd 4958 (denying application for review of denial of petitions for reconsideration of forfeiture orders) (2001) ("*EZ Sacramento*"), *recon. dismissed*, 16 FCC Rcd 15,605 (2001).

⁹Infinity Radio Operations, Inc., Response to Notice of Apparent Liability for Forfeiture, filed September 4, 2003 ("*NAL Response*").

¹⁰*Id.* at 2-3.

¹¹*Petition* at 1-7.

¹²*NAL Response* at 3-4.

¹³*Petition* at 6-7.

¹⁴47 U.S.C. § 504(c).

rather than to the existence of the contested notice of apparent liability as such, a practice that the Commission specifically held permissible in a rulemaking proceeding on this very issue.¹⁵

6. Infinity now contends that the distinction made in the Commission's *Forfeiture Policy Statement Reconsideration Order* and the Bureau's instant *Forfeiture Order* between the use of the facts underlying an NAL or forfeiture order and the use of the existence of those orders *per se* is false and meaningless because the punitive effect on the licensee is identical.¹⁶ In this context, Infinity quotes the following language, with emphasis supplied, from the legislative history of section 504(c): "[T]he pendency of a forfeiture action, prior to final adjudication thereof . . . shall be without prejudice to the licensee in any other proceeding before the Commission."¹⁷ Infinity argues that this language is clearly inconsistent with the Commission's distinction between the use of underlying facts and the use *per se* of an NAL or forfeiture order. Infinity also claims, for the first time, that the specific use of *EZ Sacramento* here violates the Due Process Clause of the Fifth Amendment to the United States Constitution¹⁸ because there has been an unreasonable delay by the Department of Justice in bringing final enforcement action in the "highly contested" *EZ Sacramento* proceeding. Infinity notes that *EZ Sacramento* concerned events in 1998 and argues that it would have difficulty in presenting a defense on the merits of the facts at this late stage.¹⁹

7. We reject Infinity's argument that the "punitive effect" is the same whether the reference is to the facts underlying the NAL and forfeiture order or to the existence of those orders *per se*. Infinity ignores the main policy reason for section 504(c), as recognized in the *Forfeiture Policy Statement Reconsideration Order*, *i.e.*, not to penalize someone for challenging the NAL rather than paying it.²⁰ In either case, the factual findings determined in those orders remain available for other appropriate purposes, such as to resolve whether the licensee is engaging in a pattern of non-compliant behavior.

8. In addition, Infinity's quotation from the legislative history is misleading. After the general language quoted above, which simply tracks the language of the statute itself, that same passage specifies that:

[Section 504(c)] is not intended to mean that the facts upon which a notice of forfeiture liability against a licensee is based cannot be considered by the Commission in

¹⁵*The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17,087, 17,102-04, ¶¶ 32-36 (1997) ("*Forfeiture Policy Statement Report and Order*"); *on recon.*, 15 FCC Rcd 303, 303-305, ¶¶ 3-5 (1999) ("*Forfeiture Policy Statement Reconsideration Order*") (collectively, the "*Forfeiture Policy Statement Rulemaking*"). In the instant proceeding, Infinity did not mention the rulemaking disposition of this precise issue until its *Petition*, even though it was one of the principal commenting parties on the question in the *Forfeiture Policy Statement Report and Order* (*id.*, 12 FCC Rcd at 17,102, ¶32) and a subsidiary of the company that filed a petition for reconsideration on this issue that the Commission denied in the *Forfeiture Policy Statement Reconsideration Order*.

¹⁶*Petition* at 4. Infinity also maintains in this connection that the *Forfeiture Order* used *EZ Sacramento* as substantive support to penalize Infinity to its detriment, as well as rebuttal to counter its assertion of no prior offenses. *Id.* at 5. This is based on the fact that the *Forfeiture Order*, in rejecting Infinity's alternative claim of comparable good faith efforts to comply (to be discussed below), repeats that this was not first time Infinity had violated section 73.1206. *See Forfeiture Order*, 19 FCC Rcd at 15,462, ¶ 8.

¹⁷*Petition* at 5 (citing 106 Cong. Rec. 17623 (Aug. 25, 1960); S. Rep. No. 1857, 86th Cong., 2d Sess. at 10-11 (1960)).

¹⁸U.S. CONST., amend. V.

¹⁹*Petition* at 3, 5-6. In fact, Infinity states here that, because the five-year statute of limitations has expired in *EZ Sacramento*, the proceeding can never be finalized through a district court decision.

²⁰ *Forfeiture Policy Statement Reconsideration Order*, 15 FCC Rcd at 304, ¶ 3.

connection with an application for renewal of a license, for example, or with respect to the imposition of other sanctions authorized by the Communications Act of 1934

Once Infinity raised the issue of prior offenses, the Bureau's reference to the facts underlying *EZ Sacramento* to rebut that claim and to evaluate Infinity's overall pattern of compliance was entirely consistent with the intent of section 504(c) as specifically stated in the legislative history and as previously indicated by the Commission Reconsideration Order.²¹

9. Finally, we find no merit in Infinity's argument that any delay by the Department of Justice in bringing final forfeiture enforcement action (or decision by the Department of Justice not to do so) in *EZ Sacramento* violates Due Process to the extent we use the facts underlying *EZ Sacramento* here. In any proceeding in court regarding this proceeding, Infinity is free to argue that the facts in *EZ Sacramento* did not constitute violations. In this regard, we note that throughout the *EZ Sacramento* proceeding, Infinity only disputed the applicable law, not the facts on which the ruling was originally based.²² Accordingly, Infinity cannot credibly claim that it has been denied a fair hearing or that it would have difficulty in preparing a defense on the facts determined in the first proceeding in order to oppose use of those facts in the second proceeding.

10. In any event, we conclude that even if this were an isolated incident, a forfeiture for the base amount of \$4,000 is appropriate.

B. Infinity's Post-Investigation Remedial Efforts Do Not Entitle It To A Reduced Or Cancelled Forfeiture

11. Infinity represents that the actions of its disc jockey, Ms. Moore, were inconsistent with its written policy, that it took disciplinary action against her, and that it distributed a memo to all of its WBLK(FM) on-air personalities reiterating that policy.²³ In its *Petition*, Infinity again maintains, as it did in its *NAL Response*,²⁴ that the Bureau should cancel or reduce the forfeiture because the Commission has routinely done so in other comparable cases for good faith efforts to comply.²⁵ In addition to *American*

²¹With respect to Infinity's argument that the Bureau used *EZ Sacramento* substantively in rejecting its claim of comparative good faith compliance (see note 16, *supra*), the Bureau properly referred to *EZ Sacramento* only for the underlying facts of the earlier case, as permitted under section 504(c). In any event, as discussed below, without regard to any prior violations, Infinity is not entitled to a reduction for good faith efforts.

²²The legal issue in the twin proceedings that were eventually consolidated into *EZ Sacramento* concerned whether a prior notice of intent to broadcast effectively ceases and must be renewed when the caller has been put on hold. See *EZ Sacramento, Inc. (Licensee of KHTK(AM))*, Notice of Apparent Liability for Forfeiture, 14 FCC Rcd 4599 (MMB 1999); *Infinity Broadcasting Corp. of Washington, D.C. (Licensee of WJFK(FM))*, Notice of Apparent Liability, 14 FCC Rcd 5539 (MMB 1999); *EZ Sacramento, Inc. (Licensee of KHTK(AM))*, Forfeiture Order, 14 FCC Rcd 13,539 (MMB 1999); *Infinity Broadcasting Corp. of Washington, D.C. (Licensee of WJFK(FM))*, Forfeiture Order, 14 FCC Rcd 13,541 (MB 1999). Once consolidated, these became *EZ Sacramento (Licensee of KHTK(AM)) Inc. and Infinity Broadcasting Corp. (Licensee of WJFK(FM))*, *recon. denied*, 15 FCC Rcd 18,257 (Enf. Bur. 2000); *app. rev. denied*, 16 FCC 4958 (2001); *recon. dismissed*, 16 FCC Rcd 15,605 (2001).

²³*LOI Response* at 1-2; *NAL Response* at 2; *Petition* at 2, 6-7.

²⁴*NAL Response* at 2-4 (citing *American Family Association, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 16,530 (Enf. Bur. 2003)) ("American Family") (forfeiture for failure to maintain local public inspection file cancelled for good faith efforts to comply because the documents were unfiled but at least present at the site before licensee was actually notified of a possible violation)).

²⁵*Petition* at 2, 6-7.

Family, already cited in the *NAL Response*, Infinity offers four more decisions in support of this claim.²⁶ Moreover, in reliance on *Melody Music v. FCC*, it again argues that the Commission must explain the disparate treatment of similarly situated parties in this context.²⁷

12. We reject Infinity's contention that its asserted good faith efforts to comply are grounds for cancellation or reduction of the base forfeiture amount of \$4,000 because other similarly situated licensees have been afforded such relief. All of the cited decisions involved situations in which the licensee had undertaken substantial steps to comply with various technical broadcasting requirements before actually being notified of a possible violation. The only thing Infinity had done prior to our investigation was to maintain a written policy, which evidently had not been adequately brought to the attention of all its employees. That hardly constitutes good faith efforts, let alone the kind of good faith efforts that have led to forfeiture reductions. Indeed, the Commission has consistently refused to consider post-investigation remedial measures in other cases, both generally and in cases involving potential violations of our telephone broadcast rule.²⁸

13. For the same reason, we reject Infinity's disparate treatment claim. Infinity and the parties involved in the cases cited in the *Petition* are not "similarly situated." The case cited by Infinity, *Melody Music v. FCC*, involved disparate treatment of parties involved in the same course of events, *i.e.*, after a television quiz show scandal during the 1950's, two former producers of the programs were denied license renewals for their new, unrelated radio station, whereas the network corporation responsible for the quiz show was granted its own renewal over objections based on the scandal. Compared with Infinity's situation here, the cases it cites involve a relatively small sample with different facts, different rules, and different types of efforts to comply.

IV. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED THAT the Petition for Reconsideration filed on September 13, 2004, by Infinity Radio Operations, Inc. IS DENIED.

15. IT IS FURTHER ORDERED THAT a copy of this Order on Reconsideration shall be sent by Certified Mail Return Receipt Requested to Stephen A. Hildebrandt, Vice President, Infinity

²⁶*Id.* at 6-7 (citing *St. Louis Mobile Systems, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 17,712 (Enf. Bur. 2004) (forfeiture for failure to register tower reduced to admonishment for inability to pay, not for good faith efforts to comply before being notified of a possible violation); *Capstar Radio Operating Company*, Forfeiture Order, 19 FCC Rcd 15,374 (Enf. Bur. 2004) (forfeiture for failure to display antenna registration reduced for good faith efforts to comply after an inspection, but before being notified of a possible violation); *Forrester, et al.*, Forfeiture Order, 19 FCC Rcd 11,030 (Enf. Bur. 2004) (forfeiture for failure to enclose antenna tower with fence reduced for good faith efforts to comply because fence was being built before being notified of a possible violation); *Aracelis Ortiz, Executrix for the Estate of Carlos Ortiz*, Forfeiture Order, 19 FCC Rcd 2632 (Enf. Bur. 2004) (forfeitures for failure to maintain EAS system and studio in locale reduced for good faith efforts to comply because steps had been undertaken before being notified of a possible violation).

²⁷*Id.* at 7 (citing *Melody Music, Inc. v. Federal Communications Commission*, 345 F.2d 730, 732 (D.C. Cir. 1965) ("*Melody Music v. FCC*")).

²⁸*See, e.g., AT&T Wireless Services, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 21,866, 21,871, ¶ 14 (2002); *SBC Communications, Inc.*, Order of Forfeiture, 5535, 5542, ¶ 18 (2001); *Seawest Yacht Brokers*, Notice of Forfeiture, 9 FCC Rcd 6099, ¶ 9 (1994); *Station KGVV, Inc.*, 42 FCC 2d 258, 259, ¶ 6 (1973); *Mid-Missouri Broadcasting, Inc.*, Notice of Apparent Liability for Forfeiture, DA 04-3683, ¶ 8 (Enf. Bur. rel. Nov. 24, 2004) (regarding prank call by on air-radio personality to crisis hotline without prior notification of intent to broadcast, Bureau proposed base forfeiture amount for section 73.1206 violation notwithstanding licensee's claim that this was an "isolated incident" and that it had taken remedial measures).

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FEDERAL COMMUNICATIONS COMMISSION

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